THE ONTARIO HUMAN RIGHTS COMMISSION

IN THE MATTER OF A BOARD OF INQUIRY
COMMENCING MAY 20, 1993

B E T W E E N:

ONTARIO HUMAN RIGHTS COMMISSION and
GEORGE HOWELL

-and-

NIAGARA REGIONAL BOARD OF COMMISSIONERS OF POLICE and NIAGARA REGIONAL POLICE SENIOR OFFICERS ASSOCIATION

# INTERIM DECISION ON RESPONDENT'S MOTION

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| BOARD OF INQUIRY | Jeffry A. House | |
| APPEARANCES: | Naomi Overend | Counsel for the Ontario Human Rights Commission |
| | Paula M. Rusak | Counsel for Niagara Regional Board of Commissioners of Police |

Upon commencing at 10:15 a.m.

THE CHAIRPERSON: I have been directed by the Minister of Citizenship, pursuant to section 38 (1) of the Human Rights Code to inquire into two complaints by Mr. George Howell, that he was discriminated against in employment, contrary to sections 5 and 9 of the Human Rights Code.

Exhibits 1 and 2, Mr. Howell's complaints, provide the background necessary to understand the Respondent's preliminary motion. Mr. Howell joined the Niagara Regional Police Force in 1971. He reached 60 years of age in February 1990 and was required to retire on March 1st of that year. He alleges that this forced retirement violates sections 5 and 9 of the Code.

Ms. Rusak, counsel for the Respondent Niagara Regional Board of Commissioners of Police, argued that my jurisdiction to hear this complaint is ousted by section 120 (3) of the Regional Municipality of Niagara Act, R.S.O. 1980, which requires that every person who becomes a member of the Niagara Regional Police Force under section 120 (2):

> Shall... b) with the exception of civilian employees and assistants, be retired on the last day of the month in which the member attains the age of 60 years."

It is common ground that Mr. Howell became a member of the Niagara Regional Police Force under section 120 (2), and that he is not a civilian employee or assistant of that force.

Ms. Rusak argued that section 120 (3) has never been repealed and that at all relevant times, it had primacy over the Ontario Human Rights Code by virtue of section 176 of the said Act, which reads as follows, 176:

> The provisions of this Act apply notwithstanding the provisions of any general or special Act and in the event of any conflict between this Act and any general or special Act, this Act prevails."

That section of the Act which she terms the "paramountcy clause" was repealed by the Statutes Revision Act, S.O. 1989, ch.81, which came into force on December 31, 1991. Sections 120 (2) and 120 (3) of the Regional Municipality of Niagara Act were not repealed, but were also not made part of the Consolidated Statutes of Ontario, 1990.

Therefore, since December 31, 1991 at least, section 120 of the Regional Municipality of Niagara Act has not had the benefit of a non-obstante or paramountcy clause.

Ms. Rusak argues that since Mr. Howell's mandated retirement occurred on March 1, 1990, section 120 (3) of the Regional Municipality of Niagara Act required her client to act as they did at that time in obtaining Mr. Howell's mandated retirement, and that the Ontario Human Rights Code could not be invoked due to the paramountcy clause, which made Acts mandated by the Regional Municipality of Niagara Act section 120 (3) and indeed the Act as a whole immune to any complaints under the Human Rights Code.

Counsel for the Respondent provided me with a number of cases dealing with the proper interpretation of legislation, including In Re Hassard and City of Toronto, [1908] 16 O.L.R. 500; C.P.R. v. Department of Public Works (Ont.) (1919) S.C.R. 191; Waugh and Esquimalt Lumber v. Pednault, [1949] 1W.W.R. 14; Regina v. City Tours Ltd.; Regina v. Burnshine [1974] 44 D.L.R. (3rd) 584; and Reg. ex rel. Toronto Transit Commission v. City Tours Ltd., (1985) 51 O.R. (2d) 696.

As well, I have been provided with relevant pages from Pierre-Andre Cote "The Interpretation of Legislation in Canada", which deals with the subject of coherence between statutes.

The essence of Ms. Rusak's argument is that I am required by the principles of statutory construction to give effect to the paramountcy clause, despite the existence of section 47 (2) of the Ontario Human Rights Code.

That section reads as follows, s.47 (2):

> "Where a provision in an Act or regulation purports to require or authorize conduct that is a contravention of Part I, this Act applies and prevails unless the Act or Regulation specifically provides that it is to apply despite this Act."

That section dates from 1981, and was therefore in force at all relevant times.

For the purposes of argument, Ms. Rusak conceded that the mandatary retirement requirement set out in section 120 (3) of the Regional Municipality of Niagara Act "purports to require or authorize conduct that is a contravention of Part I." That is that it comes within that aspect of the statute.

Ms. Rusak argued that section 176 of the Regional Municipality of Niagara Act does "specifically provide" that that Act is to have priority over all other Acts, and that the words, "notwithstanding the provisions of any general or special Act" in section 176 must be taken to include the Human Rights Code.

Ms. Overend for the Human Rights Commission disagreed. She argued that section 47 (2) gives priority to the Human Rights Code unless there is a specific legislative reference indicating that an Act is to apply notwithstanding the provisions of the Human Rights Code.

In her view, a non-obstante clause such as section 176, supra., does not in itself provide a basis upon which one can conclude that the legislature intends that the Human Rights Code not apply.

Ms. Overend also developed an extensive argument based upon the dates upon which the various enactments entered into force, combined with the comparatively late inclusion of the concept of "age" as a category for protection under the Human Rights Code. She urged me to find that by priority of enactment alone one can conclude that the legislature intended to repeal section 120 (3) of the Regional Municipality Act by implication.

Given the decision which I have reached in this matter, I do not propose to discuss this second branch of Ms. Overend's submission.

In my opinion, section 176 of the Regional Municipality of Niagara Act cannot be said to express a legislative decision to render that Act impervious to complaints arising under the Human Rights Code.

If the legislature wishes to immunize legislation from Human Rights Code complaints section 47 (2) of the Code requires that it make specific provision that the legislation apply "despite this Act". That is, there must be specific reference to the priority of a given piece of legislation over the Human Rights Code. That, I believe, results form a plain reading of section 47(2).

If there were any doubt on this point, in my view it is resolved by the wording of section 47 (2) in French. The relevant portion of the French version of section 47 states that:

> "la presente loi s'applique y prevaut, a mois que la loi ou le reglement vise ne precise expressement qu'il s'applique malgre la presente loi."

The French text requires, perhaps even more clearly that the English text, that there be express reference to "la presente loi", that is, to the Human Rights Code.

I believe this conclusion is strengthened by reference to the jurisprudence of the Supreme Court of Canada having to do with human rights statutes. In Insurance Corp of B.C. v. Heerspelink and Director, Human Rights Code [1982] 2 S.C.R. 145, Lamer, J. expressed the point as follows:

> "Human Rights legislation is of a special nature and declares public policy regarding matters of general concern. It is not constitutional in nature in that it may be altered, amended or repealed by the legislature. It is however, of such nature that it may not be altered, amended of repealed, nor may exceptions be created to its provisions, save by clear legislative pronouncement."

Similarly in Zurich Insurance Co. and Bates v. Ontario Human Rights Commission, Can. Human Rights Reporter Oct. 1992 p D255 at p 263, Justice Sopinka writes:

"In approaching the interpretation of a Human Rights statute, certain special principles must be respected. Human Rights legislation is not amongst the most pre-eminent category of legislation. It has been described as having a 'special nature, not quite constitutional but certainly more than ordinary'." Ontario Human Rights Commission v. Simpson-Sears, [1985] 2 S.C.R. 536 at 547.

It is this special nature of primacy of human rights legislation which was largely unaddressed in the case law provided by the Respondent. Much of that case law dealt with the interaction of statutes of an ordinary nature, and not with the interaction of a human rights statute and an ordinary statute of general application.

The only case provided to me which interprets a conflict between a human rights statute and a statute of general application in such a way as to give the latter effect, and oust the former, is Shaw v. The Queen in Right of British Columbia (1985) C.H.R.R. D/2784, a decision of the British Columbia Court of Appeal.

In that case, subsequent to the enactment of the British Columbia Human Rights Code in 1974, the legislature approved a regulation in 1978 prescribing a mandatory retirement age at age 60, despite the existing Human Rights Code prohibition of discrimination between the ages of 45 and 65.

The Court of Appeal relied upon a non-obstante clause in the enabling legislation to rule that the 1978 regulation could stand, despite the existence of a contrary provision in the Human Rights Code.

While I have some doubts as to the status of that decision today, in view of the repeated pronouncements of the Supreme Court of Canada which elevate a human rights statute above the level of a statute of general application, I note that the British Columbia Human Rights Code referred to in that case had no analogue to section 47 (2) of Ontario's Human Rights Code.

Thus, that case involves the interpretation of a paramountcy clause in the ordinary statute, in the absence of a competing paramountcy clause in the human rights statute.

In the case before me, both the ordinary statute and the human rights statute have non-obstante clauses. As I have said, I believe that the latter, section 47 (2), requires an explicit legislative pronouncement that a statute is to operate notwithstanding the Human Rights Code before acts authorized are exempted from human rights complaint.

In the result then, I find that since section 176 of the Regional Municipality of Niagara Act does not expressly and specifically state that it is to operate notwithstanding the Human Rights Code, it is the intention of the legislature that actions purportedly taken pursuant to the Municipality of Niagara Act remain subject to the Human Rights Code, which prevails.

I find that no exemption from the Human Rights Code was intended or authorized by the legislative in its ratification of section 176. The motion is therefore denied. I thank counsel for their helpful presentations.

Jeffry A. House

JEFFRY A. HOUSE
Board of Inquiry

MAY 21, 1993